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No. 78-353

In the Supreme Court of the United States

OCTOBER TERM, 1978

LUIGI GOLDSTEIN, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the trial judge (Pet. App. 12-13) is not reported, and the order of the Court of Claims (Pet. App. 15-16) is not yet reported.

JURISDICTION

The order of the Court of Claims was entered June 30, 1978. The petition for a writ of certiorari was filed on August 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly stayed proceedings pending completion of a grand jury proceeding.

STATEMENT

Petitioner, a food service management company, brought suit in the Court of Claims, alleging that it is the

successor in interest to three organizations[1] that in 1975 contracted with the Department of Agriculture to provide meals for needy children pursuant to the Special Summer Feeding Program for Children (authorized by 42 U.S.C. 1761) (Pet. App. 15). Petitioner asserted that the Department has not paid these organizations the amounts due them, and, as their successor, it asked for judgment against the United States.

On February 21, 1978, the government moved for a stay of all proceedings until the conclusion of a grand jury investigation in the United States District Court for the Eastern District of New York (App., *infra*, 1a). It provided the court with the affidavit of the responsible Assistant United States Attorney stating that petitioner and its three predecessors in interest are among the targets of the grand jury investigation. The affidavit further stated that the grand jury is investigating allegations (1) that the 1975 agreements between petitioner's three predecessors in interest and the United States were part of a conspiracy to defraud the government, and (2) that food service management companies, including petitioner, obtained contracts with the three companies for the 1975 program in violation of applicable regulations and as part of a conspiracy to defraud the government (Pet. App. 16). The government argued that a stay of the civil suit was necessary because, depending on the outcome of these investigations, the government might have affirmative defenses or counterclaims to the present suit, based on fraud (App., *infra*, 1a).

The trial judge directed the government to file its answer to petitioner's petition, in order to determine

[1]Special Programs for Americans, Inc., Nutrition for Youth, Inc., and Bais Isaac Zvi of Remsen (Pet. App. 15).

whether "some limited discovery and pretrial proceedings * * * may be [appropriately] undertaken" (*id.* at 2a). After reviewing the government's answer, the trial judge granted the government's motion to suspend proceedings, noting that "the issues being considered by the Grand Jury may, at least to some extent, be coextensive with the issues raised in this case, particularly with respect to the execution and/or performance of the contracts in issue" (Pet. App. 13). The trial judge also required the government to advise the court at 90-day intervals of the status of the grand jury proceeding and of the additional time estimated to be needed to complete the investigation (*ibid.*).

The Court of Claims concluded that the trial judge's order was proper and not over-broad. It expressed reluctance "to require the Government to proceed in civil litigation when related criminal procedures are still in progress" (*id.* at 16).

ARGUMENT

Petitioner requests this Court to determine that the stay by the Court of Claims was improper. But the stay order is interlocutory. No final judgment has been entered in the case, and there is no reason to grant review before judgment. The present case is a simple claim for money allegedly owed. The stay will not impair in any way the effectiveness of the Court's jurisdiction once the merits of the case are decided.

The stay fashioned by the Court of Claims is, in any event, an appropriate exercise of the court's broad discretion. See *Landis* v. *North American Co.*, 299 U.S. 248, 254-255 (1936). There is no need to have civil and criminal proceedings—with potentially overlapping facts and arguments—proceed in two courts at once. The stay is properly limited in extent. It operates only for the duration of the investigation,[2] and the periodic reports

[2]The term of the grand jury expires on February 1, 1979 (defendant's Status Report, September 7, 1978).

required by the judge permit the court to determine whether any delays in that proceeding prejudice petitioner.

Contrary to petitioner's assertions (Pet. 6-7), the stay would not have been considered over-broad by the courts on whose decisions petitioner relies. Neither *McSurely* v. *McClellan*, 426 F. 2d 664, 671-672 (D.C. Cir. 1970), nor *Dellinger* v. *Mitchell*, 442 F. 2d 782 (D.C. Cir. 1971), concerned a stay limited to the duration of grand jury proceedings. In both of these cases the district court had entered a stay pending completion of all appellate proceedings in the criminal cases. In *Dellinger*, furthermore, the district court included in its order entities not subject to the criminal proceeding at all. Even in these circumstances, the court of appeals did not vacate the stay outright, but remanded for entry of a more limited stay.[1] There is no indication that those courts would have found any defect in the stay issued here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1978

[1]Both *Gordon* v. *FDIC*, 427 F. 2d 578 (D.C. Cir. 1971) and *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), upon which petitioner also relies (Pet. 6-7), concerned *denial* of a stay by a lower court. These cases therefore do not address what constitutes an over-broad stay of a civil proceeding.

DOJ-1978-11

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 560-77

(Filed April 12, 1978)

LUIGI GOLDSTEIN, INC.

v.

THE UNITED STATES

TRIAL JUDGE'S ORDER RE SUSPENSION OF PROCEEDINGS

Petition in this action was filed on November 21, 1977. Essentially, plaintiff alleges that, under three separate agreements between the United States and plaintiff's predecessors in interest, the United States was to reimburse contractors(s) for services rendered, that contractor(s) rendered all services required, that certain sums were due and owing contractor(s) under said agreements, and that these sums due and owing have not been paid and remain due and owing.

Defendant, on February 21, 1978, filed a Motion to Suspend Proceedings, pending the outcome of a Grand Jury investigation in the United States District Court for the Eastern District of New York concerning the activities of plaintiff and its predecessors in interest and agreements entered into with the United States. Defendant has pointed out that it may, depending on the outcome of these investigations, have either affirmative defenses or counterclaims based on, *inter alia*, fraud. Defendant therefore requests that all proceedings in this action be suspended.

Pursuant to Rule 39(a), defendant may amend its answer under the circumstances described therein, including by "leave of court (which shall be freely given when justice so requires)." It appears that an answer can be prepared at this time in which the Government can respond to the factual allegations set forth in the petition, and can state such affirmative defenses or counterclaims as are now known to it. Thereafter, as warranted by the Grand Jury proceedings referred to, the Government may seek to amend its answer to set forth such additional counterclaims as become known to it as a result of such proceedings. Leave for such amendment shall be freely given under these circumstances.

The filing of an answer at this time may enable the court and the parties to better determine, for example, (1) whether defendant agrees that the monies claimed are now due and owing (with payment to be subject to any offsets or counterclaims including those which may arise as a result of Grand Jury investigations) or (2) whether defendant disputes any of the facts alleged by plaintiff (apart from Grand Jury considerations) in which case some limited discovery and pretrial proceedings in this litigation may be undertaken, as may be appropriate, toward resolution of such factual disagreements.

Following filing of the answer, sufficient time shall be allowed for consideration by plaintiff as to whether any reply is appropriate, as for example in a situation where a counterclaim is contained in the answer.

Thereafter, defendant shall be requested to advise the court as to the status of the Grand Jury investigation, to the extent such advice can be given, and at that time a determination shall be made as to the propriety of suspension of further proceedings.

Accordingly, It Is Hereby Ordered That:

1. Defendant shall file its answer to the petition by Monday, May 15, 1978,thus affording approximately 30 days from the date of this order;

2. Plaintiff shall be afforded 40 days following filing of defendant's answer in which to file any reply as may be appropriate;

3. Within 10 days following the expiration of the time set forth in paragraph 2 above, defendant shall advise the trial judge of (1) the status of proceedings before the Grand Jury, (2) the length of time anticipated to complete such proceedings, if known, and (3) whether defendant continues to desire the suspension of proceedings as requested in its motion filed February 21, 1978.*

4. Upon receipt of the advice described in paragraph 3 above, the trial judge shall, as appropriate, rule on defendant's motion of February 21, 1978, taking into consideration plaintiff's opposition thereto and defendant's reply, as presently filed.

5. At any time as may be appropriate, defendant may file a motion for leave to amend the answer required under paragraph 1 above for purposes of incorporating information which becomes available during the Grand Jury proceedings and such motion for leave shall be duly considered.

6. Consistent with the above order, defendant's Motion to Suspend Proceedings is denied to the extent that defendant is hereby directed to file its Answer to the petition; with respect to other and subsequent proceedings, a ruling on defendant's Motion is held in abeyance pending the receipt of additional information as outlined above.

/s/ Judith Ann Yannello

Judith Ann Yannello
Trial Judge

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*Assuming no enlargements of time in the above schedule, although such enlargements as are warranted may be requested, the advice requested in this paragraph would be forthcoming on approximately June 30, 1978, by which time the scope of and length of time required for the Grand Jury investigation may be more accurately assessed.